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[Everything You Wanted to Know about Anti-BDS Laws, Part I](#)

Correcting various misperceptions about the scope and constitutionality of laws barring state contractors from boycotting Israel-related people and companies.

[David E. Bernstein](#)|Feb. 18, 2019 10:50 am



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I've perhaps never seen as much misinformation and bad legal analysis regarding a given issue than about state laws that require state contractors to certify that they do not boycott Israel or those who do business with Israel, otherwise known as "anti-BDS laws." This has been a product of two factors: first, a thoroughly dishonest campaign against the laws by the American Civil Liberties Union, exaggerated further by anti-Israel bloggers such as Glenn Greenwald, and second, the near-absence of those who support the laws from the debate.

I have not been involved in promoting anti-BDS laws, I am not sure they are a good idea as currently written, and I think the Supreme Court's key relevant decision, *Rumsfeld v. FAIR*, should have come out the other way, philosophically-speaking if not based on precedent. And from my personal political interest, I'm in a heads-I-win, tails-you-lose position: either boycotts of Israel get treated the same as other discriminatory acts, or the ACLU succeeds in undermining antidiscrimination laws that grate on my libertarian sensibilities by establishing that refusals to deal are subject to First Amendment scrutiny. So I don't have a strong dog in the fight, but given that I've been appalled at the misinformation campaign launched by the ACLU, I thought I'd correct the record:

Anti-BDS laws do not require anyone to "pledge loyalty to the state of Israel." This is any easy one. They simply don't. This is a lie (not the first one) that originates with Glenn Greenwald, who claimed, in a headline no less, [that a Texas anti-BDS laws required a contractor to sign a "pro-Israel oath."](#)

Contractors must simply certify that they are not participating in anti-Israel boycotts. They not only don't have to take a pro-Israel oath but are free to criticize Israel as much as they like, donate to anti-Israel campaigns or candidates, and so on.

Anti-BDS laws do not prohibit individuals in their private capacity from boycotting Israel, even if their company has business with a state that has an anti-BDS law. Anti-BDS laws only apply to companies, not to individuals. This gets a bit confusing when it comes to sole proprietorships, but I think it's clear that, say, a computer technician who signs a contract with the state can't refuse to use Israeli-made software for his contract work, but he can refuse to buy Sabra humus for his family dinner.

Anti-BDS laws do not just protect the State of Israel, as such. Many commentators have stated that they don't understand why a foreign government should be given statutory protection from boycotts. The representative Texas law defines a boycott of Israel as "refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in

an Israeli-controlled territory, but does not include an action made for ordinary business purposes." First, and importantly, the leading Israeli universities are all public, so banning boycotts of Israel prevent state contractors from boycotting students and faculty of Hebrew University, Tel Aviv University, and so on. Secondly, the laws prohibit state contractors from boycotting organizations that merely do business in or with Israel. This is a much broader category, and would include, for example, the 60% or so of American Jews who have visited Israel.

Pending federal legislation only makes the federal government neutral on state anti-BDS

laws. The Senate recently passed a bill that has been widely described by opponents as trampling on freedom of speech. In fact, the Senate bill is a response to the possibility that courts will hold state anti-BDS laws as implicitly preempted by federal policy. By explicitly stating that the federal government does not wish to preempt such state laws, the danger of implied preemption goes away. But the bill doesn't impose any restrictions on anybody, so it can't be threatening anyone's free speech rights. If there is a threat to free speech, it comes from state laws. However:

Boycotts are, according to the Supreme Court, economic action, not speech protected by the First Amendment.

(1) *The Supreme Court has several times upheld federal labor law's ban on secondary boycotts*, ie a boycott of an employer with which a union does not have a dispute that is intended to induce the employer to cease doing business with another employer with which the union does have a dispute. In those cases, the Court has stated that boycotting a business is not protected by the First Amendment.

(2) *There is no analytical distinction between a "boycott" and "refusal to deal."* Refusal to deal is obviously a form of discrimination. Imagine, for example, that a state government asked its contractors to sign a pledge that they will not refuse to contract with subcontractors owned by members of protected minority groups. This is obviously constitutionally permissible under current doctrine. If a contractor responded, "but I am exercising my freedom of association" to refuse to deal with, say, contractors owned by African Americans, or "I am boycotting contractors owned by homosexuals to protest same-sex marriage" they would be laughed out of court.

(3) *NAACP v. Claiborne Hardware is being misinterpreted.* Contrary to at least one district court decision on BDS, the Claiborne Hardware case does not state that engaging in a boycott is constitutionally protected speech; rather, it says that urging others to boycott is constitutionally protected speech. So, a state could not ban individuals or groups from urging people to boycott Israel, and probably could not make such a ban a condition of a state contract. However, it can ask a contractor to certify that it is not boycotting Israel.

The closest Supreme Court case on point, *Rumsfeld v. FAIR* is a unanimous decision rejecting an analogous free speech/compelled speech argument.

Various law schools refused to allow military recruiters to recruit their law students on the same terms as other employers. In other words, the law schools were discriminating against, refusing to deal with, or boycotting military recruiters. In response, Congress passed the Solomon Amendment. This amendment specified that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose federal funds. Just like those challenging the anti-BDS laws argue that their free speech rights are violated by anti-BDS laws, the law schools in FAIR argued that their free speech rights are violated by the anti-boycott-the-military Solomon Amendment.

The Supreme Court's made short shrift of its argument, in language that is equally applicable to the anti-BDS laws. "Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds. The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds. ... As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must do—afford equal access to military recruiters—not what they may or may not say."

As for the claim that requiring the law schools to assist with military recruiting constituted compelled speech, "In this case, accommodating the military's message does not affect the law schools' speech,

because the schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school."

[As Eugene has reminded us](#), while the FAIR case dealt with the disposition of federal funds, the Court's opinion suggested that boycotts/refusals to deal are not protected by the First Amendment, period.

[David Bernstein](#) is a professor at the George Mason University School of Law. He is the author of [Rehabilitating Lochner: Defending Individual Rights against Progressive Reform](#) (University of Chicago Press) and [Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal](#) (Duke University Press).

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